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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	
RIGHT NO. G65713-76N BY FRED FAGAN)	FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 31, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, authorization is hereby granted to Fred Fagan to change the place of use for his water right (10% of the total flow of the source springs) from the NE $\frac{1}{4}$ of Section 14 to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 21 North, Range 29 West, Sanders County, Montana, for domestic uses. The period of appropriation shall be January 1 to December 31, inclusive, of each year.

CASE #

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. In the event that a court of competent jurisdiction determines the Appropriator does not possess the water use right which is the subject of the present change, the Change Authorization in this matter will terminate.

D. Any temporary diversion system which the Appropriator may utilize must be repaired and maintained in a condition adequate to ensure that waste does not occur, and must include a pressure tank for relief of pressure in the line.

E. The Appropriator's permanent diversion system must be constructed and maintained in accordance with specifications developed by the Soil Conservation Service or other technically qualified experts, and must include an adequate and nonwasteful

pressure relief. All pipelines in the system must be laid below frost line.

F. At whatever point the Appropriator is allowed to divert (at the source spring(s) or at the existing pipeline), the Appropriator must install an on-line measuring device, and shall keep a written record of the flow rate of all water diverted. These records shall be made available to the Department upon request. If the Appropriator is allowed to hook up to the existing pipeline, the Appropriator shall also be required to install a flow meter in the pipeline below the spring box, and shall make regular checks on the flow to ensure that the amount of flow which the Appropriator is diverting from the main pipeline does not exceed his portional share.

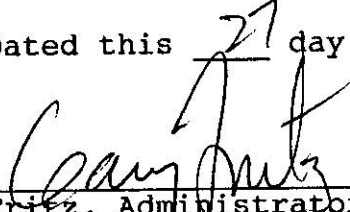
G. The Appropriator shall install any valves or other quantity control devices which are necessary to limit the Appropriator's diversion to his portional share.


H. Issuance of this Change Authorization by the Department in no way grants the Appropriator any easement rights or the right to enter upon the property of other persons to exercise this Change Authorization.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 27 day of April, 1989.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605


Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 28 day of April, 1989, as follows:

Fred Fagan
P.O. Box 571
Thompson Falls, Montana 59873

James R. and Nancy Doyle
P.O. Box 565
Thompson Falls, Montana 59873

T.J. and Marian Hamilton
P.O. Box 1404
Thompson Falls, Montana 59873

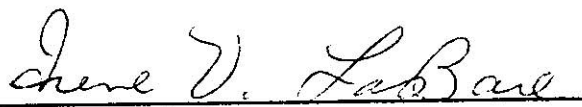
Chuck Brasen
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218 East Front
Missoula, Montana 59802

John E. Thorson
Doney and Thorson
P.O. Box 1185
Helena, Montana 59620

Calvin W. Wilson
P.O. Box 1030
Thompson Falls,
Montana 59873


Irene V. LaBare
Legal Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT NO. G65713-76N BY FRED FAGAN)

PROPOSAL FOR
DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 25, 1989.

Applicant Fred Fagan appeared at the hearing in person and by and through counsel Arlene Ward Braun.

Howard Newman, a consulting hydrologist, appeared as a witness for the Applicant.

Orville Berkey appeared as a witness for the Applicant.

Objectors T.J. and Marian Hamilton appeared at the hearing in person and by and through counsel John Thorson.

Objectors James and Nancy Doyle appeared in person and by and through counsel John Thorson.

Objector Calvin W. Wilson appeared in person and by and through counsel John Thorson.

William Uthman, hydrogeologist with the Department of Natural Resources and Conservation (hereafter, the "Department"), appeared as staff expert witness.

CASE #

PRELIMINARY MATTERS

At the January 25, 1989 administrative hearing in this matter, the Objectors moved to certify to the Water Court the determination of the Applicant's claimed water right for which the change has been requested, on the basis that the Objectors dispute that the Applicant has any interest to change. See Objectors' January 25, 1989 Motion. The Applicant initially did not object to the motion. The Hearing Examiner informed the parties that she would take the motion under advisement.

During a discussion "in chambers" later in the day, the Hearing Examiner informed the parties that the Department does not have jurisdiction to make final determinations on claimed water rights, and that the final determinations on the disputed water rights would have to be made by a court of competent jurisdiction, probably the Water Court. Counsel for the parties also were informed that certification to the Water Court conceivably could result in a lengthy delay. Counsel agreed to expedite the change application proceeding by assuming the underlying water right to be valid for purposes of the administrative hearing.

As a result of the discussion concerning the possibility that certification to the Water Court might result in an extensive delay, Applicant now opposes certification and requests that the water right be defined in the district court action in which the parties presently are involved (Cause No. DV-87-105, 20th Judicial District). Applicant cites the disadvantages of

delay to obtaining relief and to providing facts and testimony from the Objectors, two of whom are elderly and in poor health. See Applicant's post-hearing Brief in Support of Change and in Opposition to Certification to the Water Court, dated February 25, 1989, pp. 23-28. The Objectors, conversely, argue that not all of the issues can be consolidated in the district court action, and that the Applicant should not be allowed to withdraw from agreeing to certification, since there were all elements of a stipulation, including agreement as to the terms. The Objectors argue that they limited the presentation of their case in reliance on the stipulation. See Objectors' post-hearing Brief of Objectors Hamilton, Doyle, and Wilson, dated February 27, 1989, pp. 3-5.

The Hearing Examiner hereby denies the Objectors' Motion to certify, and rules that the Applicant did not enter into a binding stipulation.

A. Discussion of stipulation

The cases cited by the Objectors in support of their position involve situations where the parties met, agreed upon certain facts and made express agreements which were reduced to writing, and presented these stipulations to the court. In contrast, in the present administrative proceeding, there was no preliminary meeting, no agreement as to facts or issues to be certified, and arguably no understanding on the Applicant's part as to the ramifications of the proposed certification until counsel had had an opportunity to review the content of the

discussion held in chambers. By the end of the hearing, the parties had agreed only that ownership issues would have to be finally decided in a forum other than the administrative hearing, and that counsel and the Hearing Examiner would confer by conference call at a later date concerning possible certification issues. At the time of this conference call, the Applicant requested that the certification not occur, hence no facts or issues were agreed upon by the parties for presentation to another forum. Under these circumstances, there is no convincing reason to construe the Applicant's initial silence on the question of certification as a stipulation.

The parties agreed to defer the issue of ownership and expedite the administrative hearing by assuming arguendo that the Applicant's water rights exist. The Objectors claim to have relied on this agreement and cut short their presentation. However, a review of the record indicates that the Objectors covered all of the issues relevant to the change proceeding, and addressed all of the pertinent statutory criteria. The only issue not addressed as a result of the assumption is that of ownership. Since the Department will not be making that determination even in the absence of certification, however (see discussion, infra), the Objectors are not injured by having foregone a discussion of the issue: The Department will be making determinations only on the issues the Objectors had full opportunity to address.

B. Discussion of certification

Section 85-2-309(2)(a), MCA, states, in pertinent part, that the Department may "in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing".¹ In compliance with the statutory requirements, the Hearing Examiner hereby notes for the record her decision to deny the motion for certification.

It is clear from the relevant statutes and case law that the Water Court has jurisdiction over all pre-1973 use rights of water for which claims have been filed. (See Montana Code Annotated, Title 85, chapter 2, part 2; United States v. Montana Department of Natural Resources and Conservation (Cause No. 50612, First Judicial District)). However, the adjudication statutes do not grant the Water Court jurisdiction over water

¹ Previous certification actions by the Department have resulted in a determination that § 85-2-309(2)'s language concerning certification to the district court is to be construed in reference to the language in § 85-2-309(1) which specifies certification "for determination by a water judge," so that certifications are filed with the appropriate district court but the determinations are made by the Water Court. See, e.g., In the Matter of the Application for Change of Appropriation Water Right Nos. G120401-41H and G120403-41H by Estate of Lena Ryen.

rights which are exempt from the Water Court process (see § 85-2-222, MCA), for which no voluntary filing was made. See In the Matter of the Application for Beneficial Water Use Permit No. 63377-s76G by Robert and Debby Hollenback, December 16, 1988 Final Order.

A review of the record in this matter indicates that the water right which the Applicant claims is not a right which has been claimed in the adjudication process. See Application. In fact, of all the relevant water rights of all the parties to this matter, only one (possibly two) rights have been claimed -- the stockwater rights of Calvin Wilson (Claim No. 133266-g76N), and possibly the domestic water rights of Objector Hamilton (Claim No. 120931-g76N), although the latter claim was filed by Wiley and Laoretta Baker not necessarily on behalf of the Hamilton property. See Finding of Fact 7, infra. The rest of the water rights are exempt domestic or stock rights, or are post-1973 permit rights.

Therefore, a question exists as to whether the Water Court is the proper forum for review of the underlying water rights in this matter, since the Applicant's right is an exempt right for which no filing was made. It is possible that the district court can consolidate the issue of the existence of the underlying water right into the action presently pending and that it would want to do so, given that resolution of the issues (such as conversion) rests on a finding that the Applicant possesses the water right which is the basis for the cause of action.

If the district court determines, on the basis of the arguments and evidence presented in the court action, that the issues cannot be decided without Water Court determinations on those water rights of the parties which have been claimed in the adjudication process, certification by the district court to the Water Court may be the proper recourse. However, based on the limited facts before the Department, the Hearing Examiner cannot find that certification is necessary or proper in this matter.

Wiley and Laretta Baker sold a portion of their water right to the Applicant in this matter. No party has suggested that the Bakers did not have a valid water right to transfer; in fact, Objector Hamilton's water use also derives from a portional share of the Baker right. See Findings of Fact 5-7, infra. The fact that the Bakers neglected to file a transfer form or to obtain approval prior to severing part of their water right from the land to which it was appurtenant, as required under § 89-893, R.C.M. (1977), does not invalidate the underlying water right or its transfer. The water right transferred by operation of law through the conveyancing documents, while failure to comply with the requirement of prior approval serves only to suspend the Applicant's ability to use the right until the mandated Department approval of the change is granted. Castillo v. Kunneman, 197 Mont. 190 (1982). The Applicant's present application for change authorization acts to remove this impediment. Therefore, there is no basis for the Department to believe that certification of the Applicant's underlying water

right is necessary. For purposes of the Department's administrative action, the Applicant has shown sufficient basis of ownership to allow the Department to act on the application for change authorization.

The Hearing Examiner also finds weight in the Applicant's arguments for determination of the ownership issue by the district court. The parties already are joined in an action in the district court, which most likely will have to address the ownership issue in reaching its decision, and appears to have the jurisdiction to do so. Therefore, there is reason to believe that an answer to the issue may be arrived at in a more expeditious manner than if parts of the issue are transferred to the Water Court forum.

Upon its findings that there is insufficient basis for certifying the issue of the Applicant's ownership of the captioned water right, and that a final determination of the ownership question is not necessary in order for the Department to make the determinations required pursuant to § 85-2-402, the Department declines to certify this matter to the Water Court.

C. Ancillary issues

The testimony and exhibits presented at the hearing indicate that there are many unanswered questions concerning the water source involved in this matter, and the parties' use of it. While these issues have not been addressed in the present Proposal for Decision since determinations thereon are not necessary to reach determinations on the relevant statutory

criteria, the Hearing Examiner sets them forth here because future utilization of this water by the parties may depend on the answers.

The most obvious unanswered question is, what waters comprise the source which was decreed in 1920? The Applicant, Objectors Hamilton and Wilson, and Wiley and Laurretta Baker all have use rights which derive from the 1920 decreed right. The water source for these rights is purported to be three springs located in Section 11, Township 21 North, Range 29 West, Sanders County, Montana. However, there are several springs located in this vicinity, as indicated by the Water Resources Survey and the Field Investigation Report in this matter. See Finding of Fact 8, infra. Neither the parties nor the experts present at the administrative hearing agree as to which three of the several possible spring sites make up the decreed source. Yet a determination on this issue would appear to be most important to all of the parties, since obtaining sufficient water to meet the needs of all the users may depend on fully utilizing all of the water which comprises the source. Furthermore, an answer is necessary in order for the parties to be able to determine if or how Mr. and Mrs. Doyle are involved in the water distribution process.

Other unanswered questions concern the existence and extent of the Bakers' water right. Was Statement of Claim for Existing Domestic Water Rights No. 120931-g76N filed on behalf of the Hamiltons' place of use, as the Hamiltons claim, or was it filed

on behalf of property which the Bakers still own? If filed on behalf of the Bakers' property, do the Bakers purport that it represents the 60% of their total original water right which remains after selling 20% of the total right to the Applicant and 20% to the Hamiltons? Again, it would seem to be to the parties' advantage to have these questions answered, to forestall possible future problems with water distribution and division which may arise if the Bakers or other successors in interest to the Bakers act to utilize the balance of the right.

Other questions the parties may wish to have answered in order to be able to establish a stable water supply situation among themselves are: whether all irrigation uses allowed by the 1920 decree have been abandoned because no adjudication claims were filed; whether whatever spring is determined to be the third spring (in addition to the springs designated as the lower and middle springs) which constitutes the source has been abandoned; and how the easement provisions of the 1920 decree and those specified in the conveyance documents between the Bakers and their buyers can be reconciled to allow each party who is determined to have a valid water right access to the water source.

There are several unsettled issues in addition to the ones specified here; however, as noted above, the Department is not required to reach the issues nor does it have the information needed to resolve them.

EXHIBITS

The Applicant offered 17 exhibits for inclusion in the record:

Applicant's Exhibit 1 is a diagram tracing the division and use of the water rights to the three springs which are the source in this matter. The exhibit was admitted for illustrative purposes, not as proof of ownership.

Applicant's Exhibit 2 is a photocopy of the Notice of Water Right filed in 1891 by Leonard Schmitz on the source springs, claiming a priority date of February 10, 1888.

Applicant's Exhibit 3 is a photocopy of the decree in Clark's Fork Land and Cattle Company v. Good, issued on May 12, 1920 (Fourth Judicial District, Sanders County).

Applicant's Exhibit 4 is a photocopy of the plat for the subdivision when the Applicant's property (marked in red), and the property of Objectors Hamilton (blue) and Doyle (yellow), is located.

Applicant's Exhibit 5 is two photocopied pages from the 1969 Water Resources Survey for Mineral and Sanders County. One page, from the publication, shows the areas of irrigation in the area of the source, while the other is a worksheet containing a survey of the water rights used by P.E. Hungerford as of September 16, 1968. The survey lists five springs.

Applicant's Exhibit 6 is a diagram purporting to trace the ownership of the water rights of the parties in this matter. It

was accepted as being illustrative of the Applicant's position on ownership.

Applicant's Exhibit 7 is a photocopy of a buy-sell agreement between the Applicant and Wiley and Laurretta Baker, concerning the real property where the Applicant presently resides. (Five pages.)

Applicant's Exhibit 8 is a photocopy of a Notice of Completion of Groundwater Development filed by the Applicant on November 30, 1981 on developed springs.

Applicant's Exhibit 9 is a photocopy of Certificate of Water Right No. 41145-g76N issued to Fred Fagan for 10 gallons per minute ("gpm") up to 1.5 acre-feet of water per year from developed springs, with a priority date of November 30, 1981.

Applicant's Exhibit 10 is a copy of "comments" by Howard Newman on the report written by William Uthman. (Two pages.)

Applicant's Exhibit 11 is a photocopy of a line graph showing the cumulative departure from the 85-year mean annual precipitation level, as measured at Kalispell.

Applicant's Exhibit 12 is a copy of Howard Newman's resume. (Two pages.)

Applicant's Exhibit 13 is a photocopy of the Baker-Eley purchase agreement, together with its attached "Exhibit A" which describes the water rights which are being transferred. (Three pages.)

Applicant's Exhibit 14 is a photocopy of an "Assignment of Purchaser's Interest" between John Eley and Thomas and Marian

Hamilton, in which John Eley conveys real property purchased from Wiley and Laretta Baker.

Applicant's Exhibit 15 is a diagram showing the location of the original pipeline from the springs, and the pipelines of Objectors Hamilton and Doyle which currently are in place.

Applicant's Exhibit 16 is a photocopy of the Statement of Claim for Existing Water Right for Stockwater No. 33266-76N, filed by Calvin W. Wilson. (Three pages.)

Applicant's Exhibit 17 is a copy of the Water Right Transfer which purports to transfer Claim No. 120931-76N from John Eley to T.J. and Marian Hamilton, with an attachment showing the referenced claim to have been filed by Wiley and Laretta Baker. (Three pages.)

Applicant's Exhibits 2, 3, 4, 7, 8, 9, 11, 15, and 16 were accepted for the record without objection. Applicant's Exhibits 1 and 6 were accepted based on the noted limitations.

The Objectors objected to Exhibits 5, 6, 13, 14, and 17 on the basis that they address the nature and extent of existing water rights involved in this matter, and therefore are irrelevant as being outside the scope of the Department's jurisdiction. While it is true that the Department does not have the authority to make final determinations on the ownership and extent of pre-1973 water use rights, that right being vested in the Water Court (see Title 85, chapter 2, part 2, MCA), the Department is empowered to review the claimed rights of parties to a contested case hearing, to determine whether the parties

have standing, and to enable it to make the necessary determinations on adverse effect (which of necessity involve a determination of the extent of the parties' water use). Therefore, the jurisdictional objections to these exhibits are overruled, and the exhibits are accepted for the record. Each will be weighted as to its relevance to the issues in the present forum.

The Objectors objected to the designation of Howard Newman as an expert witness in this matter, and objected to Applicant's Exhibit 12 (Newman's resume) as well. However, a review of Mr. Newman's qualifications indicates that he has some expertise in geology and hydrology. In light of the fact that the Objectors did not specify any basis for not allowing Mr. Newman to testify as an expert, their objection is overruled. The extent of Mr. Newman's expertise therefore goes to the weight and credibility which will be assigned to his testimony. There is no basis for excluding Mr. Newman's resume, and therefore Applicant's Exhibit 12 has been accepted for the record.

The Objectors also objected to Applicant's Exhibit 10 based on their objection to Mr. Newman as an expert witness. This objection also is overruled, and Exhibit 10 is accepted for the record. However, those portions of Mr. Newman's "comments" which apply to subjects outside his area of expertise (his comments on the division of water and on ownership and maintenance, for example), and those which consist wholly of speculation, will not be accorded any weight.

The Objectors offered one exhibit at the hearing for inclusion in the record:

Objectors' Exhibit 1, a photocopy of the topographical map used by William Uthman in his report, originally was to be introduced as an exhibit by the Applicant to show the location of the springs in question. However, when the Applicant's witness Orville Berkey was unable to accurately locate the springs, the Applicant withdrew the exhibit; the Objectors then moved to have the exhibit accepted as the Objectors' exhibit. The exhibit was not accepted for the record since a review of the map indicated that, showing as it did only a small portion of the area, the map was difficult to properly orient. However, the Hearing Examiner noted for the record that witness Berkey admitted that he could not properly indicate the location of the springs on the map.

A document marked Objector's Exhibit 2, a photocopy of Certificate of Water Right No. 65102-g76M issued to the Applicant for a groundwater well, was submitted by the Objectors after the hearing to "supplement the administrative record in this proceeding". (February 27, 1989 cover letter to offered exhibit.) Since the record was left open only for the submission of briefs, the Hearing Examiner declines to accept this document as an exhibit for the record; however, notice will be taken of the existence of the Applicant's groundwater well, as corroborated by testimony at the hearing.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file, including

William Uthman's January 10, 1989 Field Investigation Report, was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in this matter in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature". Since the present change application does not involve the quantity of water necessary to trigger legislative review, the Department has jurisdiction over this Application for Change.

2. Application for Change of Appropriation Water Right No. 65713-g76N was duly filed with the Department of Natural Resources and Conservation on May 26, 1987, at 9:30 a.m.

3. The pertinent portions of the Application were published in the Sanders County Ledger, a newspaper of general circulation in the area of the source, on January 28, 1988.

4. The Applicant proposes to change the place of use for groundwater from three springs located in Section 11, Township 21 North, Range 29 West, Sanders County, Montana.

The three springs are located in the NE $\frac{1}{4}$ of Section 11, Township 21 North, Range 29 West, Sanders County, Montana. Their waters were appropriated for use on May 1, 1888, by the predecessors of George Good, and on December 1, 1919 by the Clark's Fork Land and Cattle Company. The resulting dispute was resolved by decree (Clark's Fork Land and Cattle Co. v. Good, in the District Court of the Fourth Judicial District, Sanders County, Cause No. 1185), issued May 12, 1920. The Court granted the Clark's Fork Land and Cattle Company the use of up to one-half of the water for "domestic and stock purposes only", with the water to be turned off when not being beneficially used, while Good was granted the use of the other half of the water and any waters not being used by the Company.

5. Calvin Wilson, an Objector in this matter, is the successor in interest to the "half share" of spring water granted to the Clark's Fork Land and Cattle Company. (See Department file, Statement of Claim for Existing Stockwater Rights No. 133266-76N filed by Calvin Wilson; Applicant's Exhibit 1.) George Good's half of the use right has passed through several successors in interest, including Orville Berkey and Wiley and Lauretta Baker. The Bakers subdivided the property to which their proportional share of water was appurtenant, and sold a lot to the Applicant in this matter in 1978 (Tract 8, 14.51 acres), along with 20% of the Baker water right. (See Department file; Applicant's Exhibit 7.) The Bakers also sold a lot, apparently the original homestead, to John and Lori Eley, who in turn sold

it to Objectors Thomas and Marian Hamilton in 1985 (Tract 3, 10.39 acres). (See Department file; Applicant's Exhibits 4, 13, and 14.) This lot also was sold with 20% of the Bakers' water rights. The Bakers also sold a lot (Tract 16, 10.47 acres) to James and Nancy Doyle, who applied for and were granted Certificate of Water Right No. 65687-g76N for 15 gpm up to 1.5 acre-feet of groundwater per year, with a priority date of July 17, 1987. (See Finding of Fact 9, below.)

6. The purchase agreements entered into between Wiley and Lauretta Baker as sellers, and Fred Fagan and John Eley as buyers specify that each of these purchasers obtains 20% of the Baker water rights, together with a nonexclusive easement from the springs, and that buyer Fagan also is entitled to an easement for the installation and maintenance of a water line from the existing line running to Tract 8 (Hamilton). The Bakers reserved the rights of use of the spring water for other purchasers, together with all necessary easements and rights of access. (See Applicant's Exhibits 7 and 13.) The Bakers did not file ownership transfer forms with the Department to reflect the portional transfers of the water right to Fagan and Eley.

7. When John Eley sold his tract to Thomas and Marian Hamilton in January, 1985, he filed a transfer of water right. The transfer refers to Statement of Claim for Existing Domestic Water Rights No. 120931-g76N, filed by the Bakers on March 11, 1982, as the right being transferred. (See Applicant's Exhibit 17.) This Statement of Claim claims 30 gpm up to 1.5 acre-feet

of water per year for use on two acres of land located in the N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 14, Township 21 North, Range 29 West, Sanders County, Montana. Nothing on the face of the claim (which was filed four years after the sale of the property to Eley) indicates whether the claim was filed for the portional share of the Bakers' water which was sold to Eley, or whether the claim was made by the Bakers on behalf of property they still retained after selling to Fagan and Eley. The legal description is not specific enough to determine for what tract or tracts the water use right has been claimed.

8. The parties differ as to which three springs in the area are the water source claimed by George Good and Clark's Fork Land and Cattle Company and their successors in interest.

The parties agree that there is a cluster of springs in the NE $\frac{1}{4}$ of Section 11, Township 21 North, Range 29 West. The Applicant alleges that the springs referred to at the hearing as the "lower", "middle", and "upper" springs are the springs which constitute the original water source discussed in the 1920 decree. Orville Berkey, a successor in interest to George Good, testified that he recognized these three springs as being the source springs when he returned to the site in 1988.

However, William Uthman located another possible spring in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, southeast of the developed spring referred to as the "lower" spring, as well as remnants of a pipeline. (See January 10, 1989 Field Investigation Report.) James Doyle testified that Calvin Wilson had told him that one of

the "three springs" was below what is now known as the "lower" spring. A review of the Water Resources Survey indicates that, in addition to three springs located in the NE¼ of Section 11 listed as decreed to George Good (priority date of May 1, 1888), another spring had been claimed in the NE¼ of Section 11 by Leonard Schmitz (priority date of February 16, 1891). See page 2 of Applicant's Exhibit 5.

James Doyle testified that, on the basis of Mr. Wilson's statements that the "upper" spring was not one of the original springs and on the fact that such spring apparently never was developed, he had developed this spring himself in 1980. He was granted a Certificate of Water Right for groundwater from a developed spring in 1987. (See Finding of Fact 6.)

It is not possible to determine from the record in this matter whether the "three springs" which are the source of the decreed right from which Fagan and Hamilton derive their claimed use rights include the spring which has been developed by Doyle, include what has been described as the "lower" and "middle" springs along with the possible spring described by William Uthman, or actually are composed of some other combination of water sources. It also is not possible to tell how much water, if any, the springs other than the lower spring historically have contributed to the water supply which comprises the decreed, claimed use right in this matter.

9. When the Applicant entered upon the property he had purchased in 1978, the water system which existed at that time

consisted of one pipeline, which ran from a springbox installed at the "lower" spring (spring No. 1, as shown on the map accompanying the Field Investigation Report) to the tract of land which the Hamiltons now own. Pursuant to the easements granted to him by the sellers (see Applicant's Exhibit 7), the Applicant installed a plastic pipeline from the original pipeline over to his own place of use.

The original pipeline apparently was installed sometime between 1920, when it was authorized in the decree, and 1942, since Mr. Wilson testified that it was installed prior to his own residence in the area. The parties agree that the pipeline was buried at a shallow depth for the upper portion of its length, and that it was on or near the surface crossing the "flats" at the bottom end of the line. The pipeline had broken in three or four places over the years, to the extent that pools of water formed from which Mr. Wilson's stock obtained their water. (Testimony of Fagan, Hamilton, Wilson.) The Applicant testified that he repaired the line after he moved on to his property, but that there were new breaks every year, created by excess pressure in the line or freezing, or when a joint came apart. The Applicant testified that he continued to repair the pipeline, digging it up where necessary to make the repairs.

The original line was utilized by allowing the water to gravity flow into the Applicant's diversion pipe and to continue down to the Hamilton property. Objector Wilson utilized the water on his property by having his stock drink from the pools

created by breaks in the pipeline. No attempt was made to control the amount of water received at the various places of use. The Applicant let his water run to prevent freezing and pressure buildup. (Testimony of Fagan.)

10. In 1985, Objector Hamilton disconnected the old pipeline and removed the springbox, and replaced them with a concrete collection tank at the lower spring and approximately 3,900 feet of new pipeline, installed below the frost line as determined by the Soil Conservation Service. (Testimony of Hamilton.) Mr. Hamilton installed a pressure tank on the hill, a 1,500 gallon storage tank, and a stock tank on the property line between Hamiltons' and Wilsons' property. He controls the amount of water that goes into his house through the use of valves, and uses a float valve at the stock tank in the summer. The stock tank is allowed to run all winter to prevent freezing. There also is an overflow on the pressure tank on the hill. Water which overflows the tank presently is allowed to run into the old pipeline so that the Applicant receives it. (Testimony of Hamilton.)

11. Subsequent to the removal of the original diversion system, and of the Applicant's apparent resulting discovery that the paper work which he previously had filed (Notice of Completion of Groundwater Development, received on November 30, 1981) did not serve to change the place of use for his portion of the 1888 water right to his tract of land (see Department file), the Applicant filed the present Application for Change of

Appropriation Water Right to change the place of use for the right conveyed to him by the Bakers so that he may use the spring water for household and garden purposes.

12. The Applicant testified that, unless he is allowed to connect into the diversion system which Mr. Hamilton installed, he would prefer to repair what is left of the old pipeline as a means of diversion until he is able to install a new pipeline. He stated that the problems with the old pipeline mostly stemmed from the lack of pressure relief, which he feels can be corrected by putting a pressure tank on the hillside. He also stated that he would have to bury the line which runs from the old pipeline to his property to keep it from freezing if he is not allowed to run the water constantly.

In response to questions concerning how he would effectuate his diversion from the spring, if allowed, the Applicant stated that he believes there is room to install another springbox at the lower spring if he is not allowed to use the collection structure which currently is in place at the spring. He stated that he believes there is water bypassing the current structure. The Applicant additionally stated that the pond below the former springbox flowed at a rate of 50 to 60 gpm, a flow which he believes could be regained by sealing the pond and doing other development work, "depending on what work was done at the spring by Mr. Hamilton when installing the present diversion system".

The Applicant testified that he has talked to contractors about installing a new water delivery system, but has not

obtained any bids. He estimated that it might cost about \$1,000, depending on what he ends up having to do to obtain water.

Applicant's witness Howard Newman testified that the permanent water distribution system should have the pipe laid below the frost line, and include a tank -- set above the Applicant's place in elevation -- which would be located at a point where gravity flow from it would yield 40 to 60 pounds of pressure to the household. The tank would have an overflow. Mr. Newman stated that, due to the large elevation drop between the springs and the Applicant's place of use, pressure would have to be relieved through the tank location or by means of a valve.

13. As the result of losing his water supply from the springs, the Applicant installed a groundwater well in 1987 (Certificate of Water Right No. 65102-g76N) from which he diverts 5 gpm for domestic purposes. The Applicant testified that the water supply from his well is not sufficient to allow him to irrigate his garden and use water for household purposes at the same time. He testified that he would prefer to use spring water, since he believes a spring system would basically be maintenance free once it was properly installed.

14. Water availability at the springs has decreased substantially over the last few years. The Applicant testified that there was a flow of 50 to 60 gpm at the lower spring at the time he was first there in 1978. By 1984, when Mr. Hamilton first saw the spring, the flow had decreased to 4 gpm.

(Testimony of Hamilton.) At the time of the field investigation

in December, 1988, the flow had reduced to 2.5 gpm, although the discharge apparently increased to 4 to 5 gpm in early January, 1989. The upper spring utilized by the Doyles, which had an average discharge of 1.5 gpm, went dry in the fall of 1988. (See Field Investigation Report, pp. 2-3.)

As noted in William Uthman's Report, "Historical spring flow records for the source in question do not exist to provide a basis for either comparing the range of discharges and variations in discharge during previous periods of drought, or computing average discharges". (Report, p. 2.) However, Mr. Uthman and Howard Newman concur that the most likely cause of the reduction in flow from the springs is the drought which Montana has experienced for the last three to five years. Since the springs most likely are discharge points for a geologic fracture system which is recharged by rainfall and snow melt (see Report, pp. 1-2), the reduced precipitation would result in decreased hydrostatic pressures and lower water levels in the fracture system. (See Report, p. 3.) These factors would cause spring discharges to decrease, and springs at higher elevations to lose their surface flow. (Testimony of William Uthman.)

15. As long as the springs are allowed to free-flow, use of any one of the springs will not cause interference with the discharge of any other spring, since the natural flow does not affect the hydrostatic pressure within the "source" fracture system. (See Report, p. 5.) Mr. Uthman emphasized that the flow rates of such springs cannot be "stressed or altered" to

permanently increase discharge by means such as pumping. (See Report, p. 2.) However, it may be possible to capture spring discharge which now is lost to subsurface seepage by installing a liner, drainage tiles, and/or a buried perforated collection tank. (Report, pp. 5-6.) Mr. Newman stated that even the amount of flow which presently is available (2.5 to 5 gpm) adds up to enough volume to meet the current and proposed uses, based on an average household requirement of 250 to 350 gallons per day, if the water is collected and distributed "properly".

16. The main concern expressed by the Objectors in this matter is that the amount of water presently available from the source will not be sufficient to meet everyone's needs if the Applicant is allowed to reinstitute his water use.

Objectors Hamilton and Wilson both expressed doubt that the diminished flow rate can be stretched far enough to cover the Applicant's proposed use of water in addition to their own present uses. Mr. Hamilton stated that any additional use will "burden the source", and expressed concern that the lower spring might also go dry if the parties try to "pull too much" water from it. Objector Doyle also stated that he thought added use might take more water out of the mountain, possibly affecting the spring he has been utilizing.

Mr. Hamilton stated that he believes the small amount of water the Applicant might obtain from the spring would not be worth the money it would cost to obtain it, especially in view of the fact that the Applicant already has a well as a source of

water. Mr. Hamilton believes that the project will be much more expensive than the Applicant anticipates, based on Mr. Hamilton's own cost of about \$1,500 for installing his own diversion system when he did his own work.

17. Additional concerns expressed by the Objectors are that the Applicant's proposed diversion operation is inadequate, and that replacing his present diversion system will be disruptive.

The Objectors testified that the old pipeline, which the Applicant proposes to utilize on a temporary basis, is in poor condition and subject to breaks. Further, they feel that the Applicant's past practice of letting the water run constantly, even when not in use, to prevent freezing and to relieve pressure in the pipeline, was wasteful.²

Objectors Hamilton and Wilson expressed concern that the Applicant would have to disturb their property in order to install a new diversion system, and that the resultant trenching might disrupt stock operations and create a hazard unless the trenching and filling were done rapidly. Mr. Wilson also expressed his belief that the Applicant does not have an easement to do any work, since the 1920 decree limited the easement to one pipeline, and Mr. Hamilton has installed such pipeline. Mr.

² The record indicates that Objectors Hamilton and Wilson also let water run constantly at their stock tank during the winter to prevent freezing, and that Objectors Hamilton and Doyle both have overflows on their pressure tanks which result in water running onto the ground without being captured and used. (Testimony of Fagan, Hamilton; Field Investigation Report.) The Objectors did not explain why they believe these practices differ from those of the Applicant.

Wilson stated that the Applicant would have to obtain an easement from him before any work could be commenced.

18. The temporary adjudication decree for Basin 76N lists the springs at issue in this matter as an unnamed tributary of the Clark Fork River. However, no information available to the Department indicates that any water from the springs ever has reached the Clark Fork River or any tributary thereto. (See, e.g., Applicant's Exhibit 5.) Therefore, a review of the records for this source indicates that there are no records of planned uses or developments for which a permit has been issued or for which water has been reserved.

19. The documents wherein Wiley and Laretta Baker transfer a portion of their water right to the Applicant purport to limit the transferred right to "domestic use only". (See Applicant's Exhibit 7.) The Applicant stated that he does not presently have stock and he did not discuss use of water for stock. However, his application for change does include a request for stock watering.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the change authorization herein, and all the parties hereto.

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-402(2), MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

4. The proposed use of water, for domestic purposes, is a beneficial use of water. See § 85-2-102(2), MCA.

The Objectors do not contend that household uses and lawn and garden irrigation are not beneficial uses of water, nor that the Applicant's portional share of water from the springs is excessive for his purposes. They do argue that the Applicant does not need the water which he would utilize pursuant to the proposed change, because he already has other water rights. (See Objectors' Post-Hearing Brief, pp. 5-6.)

When an applicant applies for a new use permit, the Department has the authority to review the requested flow and volume to ensure that a permit will not be issued for more water than can be beneficially used without waste for the designated purpose. See § 85-2-312(1), MCA. The statutes do not contain any comparable language pertaining to the review of changes in existing rights. Assuming arguendo that the Department is

authorized to consider the amount of water available to the Applicant as a factor in a determination on the beneficial use criteria in a change proceeding, however, the existence of other water rights does not mean that the Applicant in the present matter cannot beneficially use the claimed water right he has applied to change.

Even if the Applicant were to use his claimed right from the springs in conjunction with the flow to which he is entitled from his groundwater well,³ there is nothing to indicate that the Applicant's use would be so wasteful as to be no longer beneficial. Rather, the Applicant's testimony indicates that the groundwater well does not provide enough water to allow him household and irrigation uses at the same time. Therefore, the Applicant could beneficially use both spring water and well water, although it is the Applicant's stated intent to utilize spring water in place of well water, if possible. See Finding of Fact 14. Furthermore, the Applicant cannot be required to use his well water instead of his claimed use right, even if he does obtain enough water from his well to meet his needs, as the Objectors have suggested: an appropriator cannot be compelled to

³ As noted in the Objectors' Brief, the Applicant also has Certificate of Water Right No. 41145-g76N which allows him 10 gpm up to 1.5 acre-feet of water per year from the springs, with a priority date of 1987. See Applicant's Exhibit 9. However, the Applicant's testimony in reference to this exhibit clearly indicates that the certificate is intended to reflect the Applicant's claimed 1888 water right, rather than being an additional use. Therefore, this right would not be used in conjunction with the Applicant's claimed use, but would be subsumed by it.

forego his use of a water right for the benefit of other appropriators on the source simply because he has another source of water available to him. See generally Boyd v. Huffine, 144 Mont. 306, 120 P. 228 (1911); In the Matter of the Application for Beneficial Water Use Permit No. 43117-s41P by Morris O. Mancoronal, April 18, 1984 Proposal for Decision (Final Order, June 14, 1984).

5. There is substantial credible evidence that the proposed use will not adversely affect any planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 18.

6. There is substantial credible evidence that the proposed change will not adversely affect the water rights of other persons.

Objector James Doyle alleges that the spring which he has developed is not part of the source claimed by the Applicant and the other Objectors. If this is true, he cannot be adversely affected by the Applicant's proposed changes, since the hydrologic evidence indicates that use of one spring does not have an adverse effect on the other springs. See Finding of Fact 15; Field Investigation Report. Based on this same evidence, Objector Doyle will not be adversely affected by the Applicant's proposed use of the lower spring, even if the Doyle spring is

determined to be part of the source claimed by the others. See
Finding of Fact 9.⁴

The main concern of Objectors Hamilton and Wilson is that they will be adversely affected by the Applicant's use of water because the small amount of water which is presently available from the springs would have to be further divided. (Their other concerns, involving easements and disruption of property, are not effects on their water rights, and will not be discussed in the context of this criterion.) However, this concern involves use of the underlying water right, not the effect of the Applicant's proposed change.

The scope of the Department's review in a change proceeding is limited to reviewing the effect that the change, in and of itself, will have on the water rights of other persons. Unlike in an application for a new water use permit, in a change the Department does not consider the effect of the Applicant's use of the water, since the Applicant for a change has a preexisting right to use the water. Rather, the review must be limited to the issue of whether the proposed change in the use will cause

⁴ At the present time, all of the holders of the claimed use rights are diverting water from the lower spring only, although the middle spring may contribute some incremental amount of surface flow to the pond at the lower spring. See Field Investigation Report, p. 5. The spring now utilized by Doyle could be tapped by the use right holders only if a determination is made by the district court or other proper forum that the Doyle spring is one of the three springs which comprise the decreed water source. While such action might affect the Doyle's water right, such effect would not be the result of the change for which the Applicant has applied.

adverse effect. See generally In the Matter of the Application for Change of Appropriation Water Right No. W1380008 by Delbert Kunneman, January 20, 1984 Proposal for Decision, p. 11 (Final Order, April 20, 1984.)

The fact that use by one of the holders of an existing water right will further reduce the small amount of water available to each of the other holders is the result of the division of the water right: it is not the result of a change in place of use. This is clearly a difficult situation for the water users in this matter, since they share an existing right and thereby share a priority date, and therefore cannot alleviate the water shortage by shutting down junior uses. However, the Objectors' solution of shutting off the Applicant's use by insisting that the change be disallowed clearly is not reasonable, since there is no basis for differentiating between water rights of equal priority.

7. The record provides substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The Applicant testified that he intends to use the old pipeline, if necessary, as a temporary conveyance system until he can install a new pipeline. While it is true that this pipeline apparently is subject to breaks (see Finding of Fact 9), there is nothing to suggest that the line would not be adequate as a temporary measure if steps suggested by the Applicant are taken to prevent further breakage. The Applicant stated that he would

put a pressure tank on the hillside to relieve the pressure, which he feels created most of the problems in the old pipeline.

In order to prevent freezing, the Applicant would have to run some small amount of water constantly during the winter. Although the Department does not hereby rule on the question of waste, this practice would not appear to be wasteful where the amount is limited, and the flow does not exceed the Applicant's portional share. It would appear to be a "usual and customary practice in the area", given that Objectors Hamilton and Wilson use this method to keep their stock tank from freezing. However, in the event that another forum determines this practice to be wasteful, the Applicant also has indicated that he would bury the portion of the line which runs from the pipeline to his property more deeply.

With regard to the installation of a new diversion system, the Applicant testified that there is room for him to install a separate spring box at the lower spring, if necessary, and suggested that he could also collect water which is bypassing the present structure. The latter suggestion was bolstered by the Field Investigation Report, which suggests that the Applicant's proposal to collect such water could be carried out by capturing water presently lost to subsurface seepage. (See Finding of Fact 15.) The Applicant also presented evidence through his witness Howard Newman as to how the permanent diversion system can be constructed to ensure that the means of diversion, construction, and operation are adequate (see Finding of Fact 12), and

testified that he will obtain professional advice on design and installation.

While it is true that the Applicant did not present specific engineering plans or cost estimates, the information he presented is sufficient to meet his burden of proof, especially in light of the fact situation in the present matter. The Applicant does not yet know whether he will be required to install a complete appropriation system or will be allowed to hook up to the system installed by Objector Hamilton, nor does he know exactly what easement he might have to follow. (See Preliminary Matters.)

Although perhaps the Applicant could have provided more specific information concerning a diversion system if he had waited until he had the answers to these questions before applying for a change, given the fact that the Applicant has been significantly delayed in utilizing his water right by actions of the Objectors (Finding of Fact 10), it is not unreasonable that he has worked to get the change authorization processed concurrently with obtaining the answers to these questions. Regardless, the Applicant has provided information sufficient to allow a determination of adequacy to be made.

8. The concerns expressed by the Objectors about the effects of trenching and whether or not the Applicant has the necessary easements are property issues outside the scope of the Department's jurisdiction.

It would appear likely that the Applicant will be able to obtain an easement, either through utilization of the easement

granted in the 1920 decree, the easements which the previous landowners included in the deeds (Applicant's Exhibits 7 and 13), or through a condemnation proceeding (see § 85-2-414, MCA). However, it is not necessary or appropriate for the Department to respond to this issue. If the easement cannot be obtained, and as a result the proposed change cannot be accomplished, any change authorization granted will not be perfected. See generally In the Matter of Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson, January 24, 1986 Proposal for Decision (Final Order, March 7, 1986).

The possible disruption caused by any trenching which the Applicant might have to undertake would appear to be a nonissue, since the Objectors themselves stated that the problem would be obviated if the Applicant fills the trench as he goes along. To condition a change authorization to require the Applicant to do so, however, would place the Department in a position of requiring action which it cannot enforce, since any damage which might result would be to the Objectors' property rather than to their water rights. See generally Kunnenman, supra.

9. The Applicant argues that any change authorization which may be granted in this matter should be made retroactive to the date of the February 15, 1978 conveyance of the property and water right. See Applicant's post-hearing Brief, pp. 21-23.

The Applicant argues that the Department should have realized that the form which Mr. Fagan intended to file was a Statement of Claim for Existing Water Rights and that, had such

form been filed, the present controversy would not exist. This is not a correct statement of the law. The pertinent statutory requirements clearly indicate that the Applicant would be required to obtain approval of his change in place of use even if he had filed a Statement of Claim. (See § 89-893 R.C.M. (1977), and its current counterpart, § 85-2-403, MCA.) Filing a Statement of Claim would not have exempted the Applicant from the requirement of obtaining change approval.

The Applicant's further argument that the exemption of domestic uses from recordkeeping requirements indicates that the Legislature did not intend for the change statute to apply to domestic uses, also is not on point. Domestic uses have been exempted from "recordkeeping" only for purposes of the ongoing adjudication. See § 85-2-222, MCA. For all other purposes, domestic uses are subject to the statutory requirements governing Department approval of new uses and changes in existing rights.

10. Based on the information in the record, the Applicant cannot be granted authorization to change the place of use for stock watering purposes.

A restrictive covenant is attached to the conveyance of the water right from Wiley and Laurretta Baker to the Applicant, restricting use of the water right to domestic uses only. See Applicant's Exhibit 7. Even in the absence of this limitation, however, the grant of authorization on the proposed stockwater use must be denied for the Applicant's failure to discuss if or

how water would be utilized for stock watering as well as domestic purposes. See Finding of Fact 19.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, condition, restrictions, and limitations specified below, authorization is hereby granted to Fred Fagan to change the place of use for his water right (10% of the total flow of the source springs) from the NE¼ of Section 14 to the NE¼NW¼ of Section 14, Township 21 North, Range 29 West, Sanders County, Montana, for domestic uses. The period of appropriation shall be January 1 to December 31, inclusive of each year.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in

issuing this Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. In the event that a court of competent jurisdiction determines the Appropriator does not possess the water use right which is the subject of the present change, the Change Authorization in this matter will terminate.

D. Any temporary diversion system which the Appropriator may utilize must be repaired and maintained in a condition adequate to ensure that waste does not occur, and must include a pressure tank for relief of pressure in the line.

E. The Appropriator's permanent diversion system must be constructed and maintained in accordance with specifications developed by the Soil Conservation Service or other technically qualified experts, and must include an adequate and nonwasteful pressure relief. All pipelines in the system must be laid below frost line.

F. At whatever point the Appropriator is allowed to divert (at the source spring(s) or at the existing pipeline), the Appropriator must install an on-line measuring device, and shall keep a written record of the flow rate of all water diverted. These records shall be made available to the Department upon request. If the Appropriator is allowed to hook up to the existing pipeline, the Appropriator shall also be required to install a flow meter in the pipeline below the spring box, and shall make regular checks on the flow to ensure that the amount

of flow which the Appropriator is diverting from the main pipeline does not exceed his portional share.

G. The Appropriator shall install any valves or other quantity control devices which are necessary to limit the Appropriator's diversion to his portional share.

H. Issuance of this Change Authorization by the Department in no way grants the Appropriator any easement rights or the right to enter upon the property of other persons to exercise this Change Authorization.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

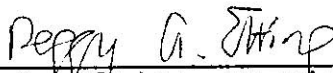
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 31st day of March, 1989.


Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 31st day of March, 1989, as follows:

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